

Supreme Court of the United States

OCTOBER TERM, 1970

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Docket No. 78

In the Matter of:

----- X
ATLANTIC CITY ELECTRIC COMPANY, :

Appellants, :

vs. :

UNITED STATES, et al., :

Appellees. :

----- X
ALABAMA POWER COMPANY, et al., :

Appellants, :

vs. :

UNITED STATES, et al. :

Appellees. :
----- X

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ATLANTIC CITY ELECTRIC COMPANY,
ET AL.,

Appellants

vs

No. 78

UNITED STATES, ET AL.,

Appellees

ALABAMA POWER COMPANY, ET AL.,

Appellants

vs

No. 106

UNITED STATES, ET AL.

Appellees

Washington, D. C.

The above-entitled matter came on for argument at
11:20 o'clock a.m., on November 12, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

1

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments in Number 78, Atlantic City Electric Company against the United States and others and Alabama Power Company and others against the United States, Number 106.

ORAL ARGUMENT BY CHARLES J. MC CARTHY, ESQ.

ON BEHALF OF ALABAMA POWER COMPANY, ET AL.

MR. MC CARTHY: Mr. Chief Justice and may it please the Court: the issue in this case is the renewability of an order of the Interstate Commerce Commission which authorizes the nation's railroads to raise their freight rates an average of five percent or nearly a half billion dollars a year.

I think it's important to have in mind just how this case arose. The usual procedure followed by a railroad when it wishes to change a rate is to file the new rate with the Commission 40 days before its effective date. During that 30-day period the rate is subject to contest and to suspension and investigation.

If the Commission determines not to suspend or investigate the rate goes into effect; the Commission's action is discretionary, not reviewable and one who wishes to complain of the rates must file a formal complaint.

On the other hand if the Commission decides to investigate the final order in the investigation proceedings is subject to judicial review.

1 In a general increase case the procedures that must
2 be followed are a little different. There are three reasons
3 for this: outstanding orders of the Interstate Commerce Commis-
4 sion which prescribe rates, those rates can't be changed without
5 Commission authorization. Then in every general increase
6 situations arise in which there is a lesser rate for a longer
7 distance than applying for a shorter distance included within
8 the longer. And that, of course, is a violation of Section 4
9 of the Act unless the Commission authorizes it.

10 Finally, there is a mechanical problem. It's just
11 not feasible to file increase in all the myriad railroad rates
12 and the preferred procedure is to file a master tariff which
13 includes all the increases and what are known as connecting
14 link supplements. These are supplements in each individual
15 tariff which simply say that all of the rates in this tariff
16 are subject to the increases in the master tariff.

17 The Commission's tariff filing rules don't permit
18 that, so in order to follow that procedure it's necessary to get
19 authority to depart from those rules. The proceeding of which
20 we seek review was initiated by the railroads by filing a
21 petition asking for all three of these forms of relief. The
22 Commission immediately granted the tariff filing authority
23 request and it modified outstanding orders and granted fourth
24 section relief only to the extent necessary to permit the tariffs
25 to be filed.

1 At this point the situation is similar to what it
2 would have been had no such authority been required. The rates
3 are filed; they are subject to protest; they are subject to
4 investigation and suspension.

5 There is one major difference, though. That is that
6 the Commission could not at this point simply say, "We won't
7 investigate and let the rates go into effect," because the
8 railroads have an obligation to get a modification of outstand-
9 ing orders and fourth section relief before they can legally put
10 these rates into effect and that's recognized by the railroads
11 In their petition they add that the rates be authorized only
12 after hearings and that after a finding that the general level
13 will not be more than is just and reasonable.

14 The rates were protested; the Commission did suspend
15 and the Commission did initiate an investigation. At the same
16 time it authorized the railroads to put into effect a three-
17 percent increase subject to investigation. That three-percent
18 increase isn't involved here; I mention it just in the interest
19 of completeness.

20 The subsequent investigation was extensive. The
21 Commission divided the case into ten subproceedings. To one
22 it assigned the question of revenue needs. To the other nine
23 it assigned various commodities and services. At the end of the
24 revenue -- at the end of the hearing in the revenue subproceed-
25 ing, the Commission entered its order of November 25th in which it

1 authorized the railroads to put in all of the increases they
2 had proposed with some minor exceptions, subject to possible
3 change as a result of the final outcome of the other nine sub-
4 proceedings.

5 At the conclusion of all the hearings the Commission
6 entered its order of January 9th. That order authorizes the
7 railroads to put the increases in effect; it orders them to
8 cease and desist from charging any higher increases. It finds
9 that the rates will not exceed a just and reasonable maximum on
10 a general basis. It modifies all outstanding orders of the
11 Commission and grants fourth section relief to the extent
12 necessary to make these increases lawful.

13 And finally, the order says the proceeding is dis-
14 continued. In other words, this is the last step in the general
15 increase case.

16 The plaintiffs in Number 106 are shippers or associa-
17 tions of shippers who pay more than 20 percent of the Nation's
18 freight bills and the action was filed as a class action in
19 behalf of all shippers.

20 In every general increase case, and I don't care
21 whether it's a railroad or what kind of utility it is, there are
22 two basic questions: one, what increase, if any, should be
23 authorized; how much more money should be provided by an in-
24 crease in rates.

25 And the second question is: how are we going to

1 spread that increase out over the various services that this
2 utility performs?

3 Our complaint goes to the first issue. We say that
4 the Commission didnot apply a rate-making standard in the Inter-
5 state Commerce Act and that if it had applied it could not have
6 authorized this increase on the present record.

7 We also say that the Commission should have looked at
8 the needs of the railroads in each of the main regions of the
9 country, rather than just a general overall increase. Then we
10 say that the Commission should have looked at types of traffic
11 by broad categories.

12 We do not say that the increase makes any specific
13 rate unreasonable. The controlling principle as we see it, is
14 that there is a presumption in favor of the reviewability of an
15 agency order. This Court has repeatedly said that an order will
16 not be held to be nonreviewable unless there is persuasive
17 reason to believe that Congress so intended.

18 The railroads point to nothing even remotely sugges-
19 tive that Congress intended to accept general increase orders
20 from the broad statutory authorization that it has given the
21 review orders ofthe Interstate Commerce Commission and to review
22 freight orders generally in the Administrative Procedure Act.

23 The railroads basically make two arguments: they say
24 we haven't exhausted our administrative remedies --

25 Q May I ask you a question?

1 A Surely.

2 Q Is this general revenue proceeding a creature
3 of statute or a creature of the Commission?

4 A It's a creature of the Commission. The Act
5 provides two sections under which proceedings can be instituted.
6 If a rate has not gone into effect the investigation is under
7 15(7); if it has then the shipper has to file a complaint under
8 Section 13. This is just a Section 15(7) proceeding but it is
9 necessary for the Commission to grant the specific authorization
10 because of its outstanding orders, relief from tariff filing
11 and --

12 Q My point is that this being an administrative
13 creature, it is not very significant, is it, whether or not the
14 statute has any review proceeding in it?

15 A Well, Your Honor, this is a proceeding which
16 follows the Interstate Commerce Act. The Commission is pro-
17 ceeding under the authority granted by Section 15(7) of the Act.
18 So the particular way that the Commission proceeds in this case
19 is a matter of administrative decision, perhaps; that the
20 authority to proceed and the basic procedure is all pursuant to
21 Section 15(7) of the Interstate Commerce Act.

22 Q Then you have specific review provisions in
23 those sections.

24 A There is a specific review provision, Section
25 1336 of Title 28 which says that all orders of the Interstate

1 Commerce Commission are subject to review in the courts.

2 If the Court please, I think that the general level
3 of freights as being a horizontal line and the individual rates
4 are dots. Some of them are above that line and some of them are
5 below and the average height of all those dots is the same
6 height as that horizontal line.

7 Now, suppose we raise that line 5 percent. If all
8 of the rates are raised proportionately the relationship of each
9 rate to that new line is the same as its relationship to the old
10 line was.

11 The railroads say: "We need to go back to the
12 Commission before we can have review of the order raising that
13 horizontal line, and file complaints on the million or so rates
14 in which we are interested. What would the issue be in such a
15 proceedings?

16 When the lawfulness of an individual rate is chal-
17 lenged the question is: how is it related to the general level
18 of reasonableness. It doesn't involve the question of where the
19 general level of reasonableness is.

20 Now, we are not challenging the relationship of
21 individual rates to that general level, so if we followed the
22 railroads' suggestion and went back to the Commission with
23 these thousands or millions of cases we would have to say to the
24 Commission: "we do not challenge the relationship of any of
25 these rates to the new level that you have set. All we want to

1 challenge is what that -- what is that level which you have just
2 set in the proceeding that has just been terminated. Now, that
3 is the administrative procedure that the railroads say we
4 haven't exhausted.

5 What the railroads are really saying is that ship-
6 pers have no interest in the general level of freight rates, no
7 legal interest. They certainly have a tremendous practical
8 interest. It's more important to a shipper to have his rates
9 raised five percent across the board than it is to have one
10 individual rate raised or to have one individual rate that he
11 thinks is a little bit too high and wouldn't it be a little
12 anomalous to say that he can have court review where his in-
13 terests are affected to a minor degree and can't have court
14 review if his interests are affected to a major degree?

15 Now, that brings me to the policy question. The
16 railroads argue that this court should deny relief because some
17 District Court, might improvidently grant interlocutory relief
18 to a shipper to the railroads' detriment.

19 In my experience I think that danger is greatly
20 exaggerated but I suppose it is possible that a District Court
21 might act improvidently, but there are two answers to that. In
22 the first place, if the safeguards that attach to interlocutory
23 relief are not sufficient in a general increase case, then the
24 thing to do is to shore up those safeguards; it's not to deny
25 judicial review. You don't throw out the baby with the bath

1 water.

2 In the second place, when Congress authorized review
3 of Interstate Commerce Commission orders it ruled an interlocutory relief would be granted in cases which this court think
4 are appropriate. If the safeguards and interlocutory relief
5 are not sufficient the railroads ought to be talking to the
6 Congress and not to this court.

8 And while we're on the field of public policy I would
9 just like to remind the Court that there are two sides to
10 every coin and we think that the policy reasons for judicial
11 review vastly outweigh any on the other side.

12 If an agency is insulated from judicial review there
13 is always the risk that their handling of cases of this kind
14 may become perfunctory.

15 Q Well, are you suggesting, Mr. Mc Carthy, that
16 if you don't prevail here that you have no avenues of review?

17 A I am stating exactly that, Your Honor. There
18 is no avenue of review. This is where the review stops. There
19 is no way that we can get review of what the Commission did in
20 this general increase proceeding unless we get it by direct
21 review. If we go back to the Commission challenging -- we have
22 to challenge every rate across the board because we are inter-
23 ested in every rate and we say to the Commission: "We're raising
24 no question about where this particular rate stands in relation to
25 this new level of rates, this new level of reasonableness that

1 you have established and we want to relitigate everything that
2 you did in 259, "the Commission very properly is going to say:
3 "This isn't the forum to do it in. That issue was settled."

4 And wouldn't it be a monstrous administrative pro-
5 cedure to say that to retill this old ground on all of these
6 individual cases after the Commission has spent months and
7 thousands of pages of testimony and arguments and briefs resol-
8 ving this specific question.

9 Thank you.

10 MR. CHIEF JUSTICE BURGER: Mr. O'Malley.

11 ORAL ARGUMENT BY JAMES O'MALLEY, JR., ESQ.

12 ON BEHALF OF ATLANTIC CITY ELECTRIC COMPANY, ET AL.

13 MR. O'MALLEY: Mr. Chief Justice and may it please
14 the Court: The Atlantic City Electric Utility and State
15 Appellants appeal here from the order of a three-judge statutory
16 court in the Southern District of New York which dismissed
17 Appellants' complaint seeking permanent injunctive relief from
18 the same general revenue order of the Interstate Commerce Com-
19 mission which has been so clearly described here by Mr.
20 McCarthy and --

21 Q I apologize for interrupting you right at the
22 threshold of your argument, but you come from a different court
23 dismissal of your petition.

24 A Yes, Your Honor.

25 Q And this suggests that if your view is correct,

1 then every single district court in the Nation could be asked
2 by a shipper to review this Commission determination. Is that
3 correct?

4 A I would say that every District Court in the
5 Nation could deliver --

6 Q In every Federal District in the country.

7 A However, as I believe we suggested in our
8 brief, the reply brief and as the Government has in its, there
9 are various judicial remedies, needless to mention to this
10 court, of transfer of venue and stays to decide bellwether
11 cases and there is always the possibility, conceivably of a
12 special master being appointed collectively, it seems to us, by
13 a group of District Courts if there are a multiplicity of this
14 type of suits.

15 In this particular case, Your Honor, we have a
16 somewhat different approach to the order from that of Mr.
17 McCarthy, and it would have been somewhat difficult, perhaps,
18 to combine the suits.

19 Q Well, I didn't -- I say, I apologize again
20 for interrupting you right at the beginning, but that is one of
21 the matters, frankly, that I have questions about. That is, I
22 don't know many District Courts there are: 86, 100, whatever
23 it is and also as I understand it, there is no statute of limi-
24 tations.

25 A This is true --

1 Q I would hope that in due course in your
2 arguments you would --

3 A We do believe, although since you say it is at
4 the threshold, it is a terribly important point and we do note
5 that there is the doctrine of laches we believe would be appli-
6 cable in this area, although there isn't a statute of limita-
7 tions.

8 But, the finality and judicial reviewability of the
9 Commission order, if I may resume my argument, sir, are also at
10 issue. It's in both cases since both courts below held that the
11 general revenue proceeding of the Commission and the order was
12 not final and not reviewable.

13 We agree with Mr. McCarthy, these Atlantic City
14 Appellants which are, I should footnote, four electric utilities
15 and ten state departments of agriculture, including the Attorney
16 General of New York representing the State of New York Depart-
17 ment of Agriculture. We agree with the United States and the
18 Commission and the Alabama Appellants that the lower courts were
19 wrong in dismissing the complaints. We all agree that those
20 parts of the Commission order that dealt with findings of
21 general revenue needs of the railroads nationwide costs to the
22 railroads, and that the railroads required additional revenues,
23 were final determinations and ripe for judicial review.

24 The position of these appellants I represent differs
25 on the reviewability point from that of the Alabama Appellants

1 somewhat but not very much.

2 The United States Commission takes the position
3 that the order appealed from was final only in the aspect of
4 revenue and findings of cost. It is our position that the order
5 should be reviewable in its entirety and that it is totally
6 ripe for judicial review under the principles of the City of
7 Chicago, Data Processing and Barlow v. Collins cases recently
8 committed to this Court, under the provisions of this Court and
9 under the general provisions of the Administrative Procedure
10 Act.

11 The railroads differ from all other parties by seek-
12 ing affirmance of the orders herein on the grounds that no part
13 of the Commission order can be reviewed and it is not final and
14 not right for review but that it's not reviewable, as well.

15 Turning now to our argument that the scope of judicial
16 review should encompass the entire order, Your Honors, I believe
17 it might be helpful, although it might sound as though I am
18 repeating some of the things that Mr. McCarthy said, to touch
19 briefly on the general revenue proceeding itself as an illustra-
20 tion of, and foundation for our contention that the other parts
21 of the order were as final as the parts of the order which were
22 alluded to by Mr. McCarthy and are accepted by the Government,
23 as reviewable.

24 After the railroads filed the master tariff which
25 increased the rates on virtually all commodities in the country

1 by varying percentages from 3 to 10 percent, the Commission
2 after suspending the tariff, as Mr. McCarthy has said, entered
3 upon an investigation into proposed increases, commodity by
4 commodity.

5 The railroads consistently refused to produce any
6 evidence related to the costs of transporting bituminous steam
7 coal or grain, for example, in the commodity hearings related
8 to those commodities; the subhearings. Those refusals were up-
9 held on appeal to the Commission, within the framework of the
10 hearing.

11 The railroads also failed to introduce any evidence
12 that the proposed increases would not drive coal, grain and
13 other commodities from the rails. It was on this kind of
14 sparse and deficient record that the Commission concluded first
15 that the percentage increases in coal and grain and in all other
16 commodities that they finally found would not "exceed
17 maximum reasonable levels."

18 And second, that those increases would not have a
19 diversionary effect on the movement of traffic by the rails.
20 With respect to the latter finding the Commission said in its
21 final order and this is in the Appendix at page 393-A: "The
22 increased freight rates and charges authorized herein will have
23 no undue adverse on the movement of traffic by railway." It is
24 the position of these Appellants that such findings which con-
25 stitute a statutory refinement for the Commission permitting

1 the increased rates to become effective had just as much
2 finality and required judicial review fully as much as do its
3 finding on railroad costs and revenues.

4 Now, if Your Honors please, there is another aspect
5 of this case at this revenue proceeding that it seems to us
6 should be equally reviewable and it relates to the Commission
7 departures from what we regard as proper procedures in conducting
8 the general revenue proceedings resulting in these final deter-
9 minations at the termination of the proceedings.

10 We regard them as essential to its findings on cost
11 revenues and across-the-board commodity percentage increases.
12 For example: there is admittedly no participation in a hearing
13 by the Commission personnel in the face of the kind of record
14 that had to be presented in a general revenue proceeding, frag-
15 mented evidence by many of our shippers and the railroads'
16 failure to present anything but the most general statistical
17 evidence on overall costs and revenue needs on a country-wide
18 basis, with no cost evidence on a commodity-by-commodity basis
19 and no substantial evidence, we submit, on the possible effects
20 of diversion. It appears to us that there was a deficient
21 record requiring the Commission, by counsel and its staff, under
22 Scenic Hudson Doctrine decided, as you will recall, in the
23 Second Circuit, 354 F. 2d and as to which this Court denied
24 certiorari at 384 U.S.

25 Under the Scenic Hudson Doctrine we submit that the

1 Commission had a duty as an agency and obligation to develop
2 and produce a complete record in all these aspects in which the
3 record was deficient and we believe that the order of the Com-
4 mission should also be reviewable from that light.

5 Now, the railroads require shippers, in order to
6 obtain reviewability of this order of the Commission, to re-
7 litigate before the Commission in proceedings under Section 13
8 and 15 of the Interstate Commerce Act, all these issues that,
9 in our view, and we submit, as it seems apparent from the record
10 and the nature of the order, were final decisions in the general
11 revenue proceeding.

12 The Government would require by its position that
13 Commission procedures and findings as to the diversion of
14 traffic and the reasonableness of commodity rates, if I under-
15 stand the Government's position correctly, and I am sure Mr.
16 Springer will correct me later if I am wrong, would have to be
17 relitigated in such proceedings.

18 Now, we respectfully submit, as I believe Mr.
19 McCarthy has already advised the Court, that neither Section
20 13 or 15 contemplates the review of determinations of such
21 broad sections as are considered in the general revenue proceed-
22 ing which the Commission has set up to deal with the special
23 economic problems of the railroads on a nationwide basis. Those
24 sections are designed to review a particular rate of a particular
25 shipper for particular traffics in some particular localities.

1 The Commission is, after hearings on these matters as to
2 specific rates then has the power to make reparation or adjust-
3 ment. They are not designed to consider the question of the
4 kind that the railroad would have referred to them or the Govern-
5 ment would have referred to them.

6 And we note that the Commission itself, in 1958, I
7 believe, decided a specific case, the Koppers Coal case at
8 303 I.C.C. where it refused to review the general findings of
9 a Section 13 proceeding brought by a coal shipper and we believe
10 that decision is correct within the proper statutory scheme and
11 the Government is in agreement with us on this point.

12 Now, these -- if Your Honors could contemplate a
13 situation where all the issues in the general revenue proceeding
14 were to be relitigated in Section 13 or Section 15 proceeding
15 if the statute permitted it, the evidence to be presented by the
16 shippers would have to be the same as was presented in the
17 earlier cases and rejected by the Commission in its order in the
18 general revenue proceedings on these broad issues and with the
19 same evidence presented can it be reasonably contemplated that
20 the Commission would then conclude that it had previously com-
21 mitted error.

22 We respectfully submit that we think not.

23 Q May I ask you when these proceedings were
24 brought the first time?

25 A Mr. Justice, the hearings of the Interstate

1 Commerce Commission were in 1968, commenced in 1968.

2 Q Is that when it was filed?

3 A It was filed in 1968, Your Honor, and in March
4 of 1968 and the first of the two final orders that made the
5 total final order, was issued in November of '68 and the second
6 in January of '69, the final order of two parts.

7 Q Do all parties agree that it is a final
8 order?

9 A No, Your Honor; I believe that the railroad
10 takes the position that it is not a final order and seek affir-
11 mance of the courts below to that effect and the Government, the
12 Commission and the Department of Justice of the United States,
13 take the position that part of the order is not final.

14 It is our position, Your Honor, that all of the
15 order was final.

16 Q All of it was final and that you should get a
17 full judicial hearing on the whole order?

18 A Yes, Mr. Justice.

19 Q Why should railroads dismiss this whole proceed-
20 ing and just file this specific rate with respect to the com-
21 modities your clients are interested in?

22 A Well, Your Honor, I think that --

23 Q You would have to challenge the rate, wouldn't
24 you?

25 A We would have to challenge the rate --

1 Q What would be the issues in that proceeding?

2 A I'm not completely clear from your question,
3 Mr. Justice, whether --

4 Q Assume the whole proceeding had never started,
5 the railroads simply come forward and file an new specific rate
6 on specific commodities that your clients are interested in --

7 A And the Commission had let it go into effect?

8 Q Yes.

9 A The procedure then, Your Honor, would be to
10 make a complaint in Section 13 and --

11 Q And what would be the issues there?

12 A The issues in that proceeding would be those
13 specified in the statute, whether the particular rate over that
14 particular route for that particular traffic was unjust,
15 unreasonable, discriminatory, preferential.

16 Q And does the statute tell the Commission what
17 factors to take into account in deciding those issues?

18 A Although it's not very specific beyond that,
19 Your Honor, but beyond the provision except that it does require,
20 I believe, that they consider diversionary effects with respect
21 to those particular rates.

22 Q Yes.

23 A But, here, Your Honor, we're talking about --

24 Q How about the revenue needs of the railroads?

25 A No, I don't believe -- yes, under Section

1 15a(2) for that particular traffic I believe that I would have
2 to answer yes, the revenue --

3 Q Well, why should you get any broader review
4 in this proceeding than you would in a 15(2) if the railroad
5 had just started out filing specific rates rather than general
6 rates?

7 A Thank you; I'll continue after lunch on that.

8 MR. CHIEF JUSTICE BURGER: Thank you.

9 (Whereupon, the argument in the above-entitled
10 matter was recessed at 12:00 o'clock p.m. to resume at 1:00
11 p.m. this day)

1 1:00 o'clock p.m.

2 MR. O'MALLEY: May it please the Court: if I may I
3 would like to return to Mr. Justice White's question just
4 before the recess which I don't believe I had explored suf-
5 ficiently for his purposes and as I understood the question is
6 whether if the carriers had filed specific rates on our traffics:
7 coal and grain traffics, could we obtain review. And, of course,
8 if that had happened, one of two things would have taken place:
9 either the Commission could have suspended and investigated
10 those rates in the same way as it did here, a general investiga-
11 tion and then decided the case and if it decided adversely we
12 believe that there would be no question that the order would
13 have been reviewable by a three-judge court such as we feel the
14 order here should be reviewable by a three-judge court under the
15 Administrative Procedure Act in the City of Chicago.

16 In fact, all we're asking for here is exactly the
17 same review, Your Honors, to which we would have been entitled
18 in the situation which Mr. Justice White hypothesized.

19 Q Yes, but what would be the issues if they had
20 filed specific tariffs and either one of the alternative things
21 would have happened, what would have been the issues?

22 A The issues would have been the justness and
23 reasonableness of the rates and the factors that would have been
24 opened would have been to the extent of those particular rates,
25 the diversionary effects of the increases on those particular

1 traffics which would not have taken into account the total
2 diversionary effects which we feel have been decided in this
3 case-on a nationwide basis.

4 Q What else?

5 A And to the extent it was possible in this
6 miniscule section of the total revenue picture of the railroads
7 to determine the revenue needs related to those particular
8 tariffs perhaps, but not the broad based kind of hearing that
9 we had before in this case where all the nationwide commodities
10 and statistics are involved and the Commission has authorized a
11 raise in rates across the country which affects every tariff in
12 the country, based on the premises determined in the investiga-
13 tion hearing they started here in Section 15(7) which, indeed,
14 is determinative of these issues to the point of authorizing the
15 railroads to raise their rates on all these commodities. There
16 is where our point of review comes --

17 Q Yes, but isn't your -- aren't the interests
18 of your client really in the rates on their traffic?

19 A Well, the interests of our clients are really
20 in getting a judicial review of the acts of the Commission in
21 making a determination that results in an increase across the
22 board in operations in our traffic and if that --

23 Q Yes, but you are just interested in your own
24 traffic, aren't you?

25 A We are interested in our own traffic ultimately;

1 yes, sir, Your Honor, but --

2 Q Are you interested in litigating the rates on
3 cantaloupe on the West Coast or something?

4 A No, Your Honor. We are interested in litiga-
5 ting the entire -- in having a review of the entire proceeding
6 which happened to impinge on us to the extent of many millions
7 of dollars by virtue of the overall decision which we claim is
8 unsoundly based in fact and law.

9 Q But if it isn't unsound as with respect to your
10 traffic, why do you want to argue that it is unsound on can-
11 taloupe?

12 A We want to argue that it's unsound with respect
13 to our traffic, of course, but we want to also argue --

14 Q I know you want to, but why should you have
15 any substantial interest in what the rates on cantaloupe are?

16 A If Your Honor please, I believe the kind of
17 proceeding that would take place were this sent back for review
18 by the three-judge court, would review the issues in the big
19 proceeding that impinged on the traffic we were concerned with
20 and would, if any refunds or refunds related to our traffics,
21 not the entire order, I would assume that the court would limit
22 the impact of its findings to the situation of the complaints.
23 That would be my interpretation of what would happen.

24 Q Then it isn't the broad tax that we heard
25 discussed this morning, really; is it?

1 A Yes, Your Honor, because, Mr. Chief Justice
2 the only reason these rates had been raised and the reason we
3 asked your review of this investigation of the Commission is to
4 determine that these rates could be raised by this much but on
5 the basis of the record which we claim is deficient, improperly
6 assembled and evidence is insubstantially founded and that
7 there were proper considerations as the statute requires in
8 Section 15a(2) of diversion where final findings should have
9 been made as to diversion and were, as we contend and we feel
10 that we have been misdealt with, our clients have been misdealt
11 with by the Commission in the way it has conducted this pro-
12 ceeding.

13 Q Well, if you could do so, could you give me any
14 idea of what percentage of the total order would be reviewed
15 under this -- is it dollars or --

16 A I think that would be difficult to do except to
17 say that our clients perhaps are involved in something of the
18 order of \$5 million a year of rate increases in a very broad
19 sense or against maybe \$400 million worth of rate increases on
20 the total that were authorized by the Commission. But, this is
21 a very difficult figure to arrive at with any precision, Mr.
22 Justice.

23 If I may I would like to conclude my argument and
24 leave two of the minutes that are left to Mr. McCarthy who has
25 reserved them for rebuttal, simply asking that we urge the Court

1 to reverse the order of the lower court and remand for trial.

2 MR. CHIEF JUSTICE BURGER: Mr. Springer you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT BY JAMES van R. SPRINGER, ON
5 BEHALF OF APPELLEE, THE UNITED STATES

6 MR. SPRINGER: I'm here on behalf of three distinct
7 Federal Government parties: first the United States, which was a
8 statutory defendant in the District Court, as it is in most
9 ICC review proceedings; second the Commission itself, whose
10 order is in question and third: the Secretary of Agriculture,
11 who has an independent statutory responsibility in ICC pro-
12 ceedings involving farm products.

13 The Secretary was a party in the Commission proceed-
14 ings below and he intervened as a plaintiff in the District
15 Court proceedings in the District of Columbia case; that is the
16 Alabama Power case, though he did not become a party, that is
17 the Secretary, in the Atlantic Electric case which was sub-
18 sequently begun in New York.

19 Because of their different responsibilities these
20 three Federal parties have taken different positions on the
21 merits of the ICC order. The Secretary of Agriculture generally
22 sides with the plaintiffs in the Alabama Power case; the
23 Commission, of course, defends its order on the merits and the
24 United States, though a statutory party concluded that it could
25 neither support nor oppose the Commission's order in the District

1 Court proceedings. But the courts below did not reach the
2 merits and so we submit they are not in issue here since the
3 courts below both dismissed the complaints before them on the
4 grounds that the plaintiffs had failed to state a claim for
5 relief; that is a claim for judicial review.

6 So, the only question here is whether the -- the
7 threshold question, whether the Commission's order was review-
8 able, is reviewable, and if so, to what extent.

9 Q What is your position?

10 A As to that I was just going to say, Mr.
11 Justice, the -- my three clients are substantially in agreement
12 on that, which is why I think I can appropriately speak for all
13 of them. We believe that the Alabama Power case in the District
14 of Columbia District Court does state a claim for judicial re-
15 view and so we agree, I think, completely with Mr. McCarthy's
16 clients in that case.

17 In the Atlantic Electric case there is to be sure, a
18 relatively minor disagreement between the United States and the
19 Commission, which are the only two Federal parties in that case;
20 but in terms of the relief we suggest, a remand of that case,
21 this difference becomes of relatively little importance. Both
22 the United States and the Commission do, however, disagree
23 significantly with the plaintiffs in the Atlantic City Electric
24 case, as I shall elaborate in a minute.

25 I think it's fair to say that the only disagreement

1 among any of the parties, including the railroads on this
2 reviewability question, is the disagreement as to whether the
3 various aspects of the general revenue order have sufficient
4 pragmatic finality to make review appropriate now or whether,
5 on the other hand, review should be deferred until shippers
6 have exhausted further administrative remedies challenging
7 particular rates like complaints under Section 13 of the Act,
8 which the Commission would then consider under Section 15(1)
9 after the rates had gone into effect.

10 We think that it's clear from both the Court's
11 decision last term and the City of Chicago case and more par-
12 ticularly on this issue from the decision several years ago in
13 Abbott Laboratories against Gardner that this is the only
14 question. Abbott Laboratories, I think, established the
15 proposition that review should be available at the earliest
16 stage at which the agency has made a final determination on a
17 controversy as to the validity of that determination, has
18 ripened as to the existence of controversy. I think there is
19 no question here. The shippers are paying higher rates because
20 of the Commission's decision so the only question, I think,
21 clearly is of finality which, as the Court again indicated in
22 Abbott Laboratories, is a pragmatic question based upon a care-
23 ful analysis of what the agency has actually done and what kind
24 of attack the parties seeking review are making upon what the
25 agency has done.

1 So that I think I should proceed now to review once
2 again, though perhaps in a somewhat different aspect, the issues
3 that were before the Commission in the general revenue proceed-
4 ing and what the Commission did with those issues.

5 A general revenue proceeding is an investigation
6 under Section 15(7) of the Interstate Commerce Act which
7 generally permits the Commission to make a final determination
8 in advance of the effectiveness of new rates as to whether those
9 rates are lawful or not.

10 Section 15(7) explicitly permits the Commission to
11 do in advance everything that it could do after the effective-
12 ness of new rates under 15 -- Section 15(1) and the 15(1) pro-
13 ceeding could be either on the Commission's own motion or in
14 response to a complaint by a shipper under Section 13.

15 Both, therefore, both of these subsections contem-
16 plate that the Commission will make the same kind of inquiry.
17 That is, it will determine whether the rates are just and
18 reasonable and further, whether they are "unjustly discrimina-
19 tory" or unduly preferential or prejudicial.

20 And Section 15a(2) expands upon the just and reason-
21 able standard so that that inquiry in substance, includes two
22 questions: first, what are the railroad's revenue needs if they
23 are to provide adequate and efficient service at the lowest
24 cost consistent with the furnishing of such service and under
25 honest, economical and efficient management.

1 And the second question under the just and reason-
2 able rubric, is what effect will an increase in whatever rates
3 are in question have upon the movement of traffic. More par-
4 ticularly, will such an increase divert traffic from rail
5 carriers to such an extent as to defeat the purpose of the in-
6 crease.

7 Now, when all the railroads in the country want to,
8 as they did here and as they had previously and subsequently,
9 want to increase all of their freight rates to compensate for
10 increased costs, it's obvious that the Commission cannot
11 feasibly make all of these determinations with the seven months'
12 suspension period that is allowed it under Section 15(7) before
13 the new rates can be allowed to come into effect.

14 And, of course, the railroads claim and the Commission
15 has to give effect to that claim that they have an urgent need
16 for an increase when this kind of situation comes up. On the
17 other hand, the Commission frequently concludes that did here,
18 that it should not allow the railroads to increase their rates
19 generally without some prior investigation.

20 In consequence, many years ago the Commission de-
21 veloped the general revenue proceeding which is a limited kind
22 of Section 15(7) proceeding in which the Commission generally
23 examines the proposed across-the-board tariff increases but
24 expressly refrains from determining the lawfulness of each and
25 every rate that would be increased.

1 Q In fact, it doesn't determine the just and
2 reasonableness of any particular rate?

3 A That's true, Mr. Justice. What it does --
4 and I will elaborate on this a little; it gives a kind of once-
5 over. It may determine as to some rates that they are unjust
6 and unreasonable and therefore should be lowered and in fact,
7 it did that in a limited number of instances in this case but
8 it does not exhaustively look at each and every rate --

9 Q I take it you are going to address yourself
10 as to whether there are any -- whether the issues that the
11 Commission does determine in this general proceeding are fore-
12 closed from reexamination in a subsequent, specific rate pro-
13 ceeding?

14 A Yes. In a nutshell: I don't think any of them
15 are necessarily legally foreclosed. However, as to the general
16 revenue needs question --

17 Q You mean --

18 A Practically there --

19 Q If a shipper fails -- if the shippers fail to
20 attack these particular determinations in this general revenue
21 procedure now be seeking review, even if they were entitled to
22 it, they wouldn't be foreclosed from raising the same issues in
23 a specific rate proceeding?

24 A Not as a matter of strict law. Practically
25 speaking, though, as to the general revenue needs question, that

1 is a question which we agree which has been thoroughly con-
2 sidered, and thoroughly decided by the Commission.

3 Q The Commission probably wouldn't change its
4 mind and if you had had the record, but the same issues could
5 be reviewed in court then?

6 A Yes.

7 Q There is no res adjudicata aspect?

8 A No; it's a matter, I suppose --

9 Q He can get the same review later in court on
10 the same record as he could get -- that you're claiming that
11 it should take --

12 A Yes, but in the pragmatic terms in which we are
13 talking, that subsequent court review of this question would be
14 in no way, no realistic way, aided by the fact that there had
15 been an additional agency proceeding in the interim as to the
16 general revenue question.

17 Q Not as to this specific issue; that's true.

18 A Yes. And now as to other issues --

19 Q -- the other issues --

20 A Yes.

21 Q And but then the court would look at it all at
22 once.

23 A As to that rate except that the --

24 Q But also the general determinations that had
25 been made in this proceeding.

1 A That certainly could be done, but our position
2 basically as to the general revenue proceeding is that isince
3 the court should review as soon as it can, as soon as there is
4 sufficient administrative finality, it should not be required
5 to wait. It might wait but it would be better policy and is not
6 necessary to wait as to the issues that have been finally de-
7 cided in the general proceeding, though I agree if it would be
8 possible for the court to review --

9 Q How long is it after the Commission makes a
10 determination like this -- well, it's immediately, isn't it,
11 that a specific rate goes into effect?

12 A Yes. In fact, the timetable of this proceeding
13 was dictated by the fact that the Commission suspended the rates
14 -- it's allowed under the statute to suspend only for seven
15 months -- the Commission's decision become final -- final order
16 came down, I think, six-and-a-half months or perhaps a little
17 more after the proceeding had been begun and at that point --

18 Q At that point a shipper can attack a specific
19 rate before the Commission?

20 A Yes, by instituting a new proceeding, which of
21 course, would take some time and it might be a year or two later
22 by the time judicial review could be had as to that.

23 Q The Commission itself, as I understand it in the
24 Koppers Company case, 303 Interstate Commerce Commission, has
25 taken the position that in a later proceeding attacking a specific

1 rate the general authorization of a rate increase is just not
2 at all relevant. Am I mistaken about that?

3 A That's what the language in the opinion --
4 I would not want -- I don't think the Commission would want me
5 to hang too much on the relatively brief language in that
6 opinion.

7 Q They simply declined to consider it, didn't
8 they?

9 A Yes. And as to the general --

10 Q Or to admit any evidence or argument about it
11 and --

12 A Yes. And as to the general revenue findings
13 the only thing it could do in such a further proceeding would
14 be a kind of reconsideration of what it had already decided
15 fully.

16 Q The Commission declined to give even that much
17 consideration, even pro forma reconsideration; am I mistaken?

18 A Yes; it's true in that case, but again I think
19 I do honestly have to say that that would not reflect a fully-
20 fleshed out and thought out Commission consideration of exactly
21 the kind of problem that we have here.

22 And of course, the Administrative Procedure Act says
23 the fact that reconsideration by the administrative agency is
24 available does not preclude judicial review before such recon-
25 sideration. So that we agree that as to the general revenue

1 questions, which are essential underpinnings of the rate in-
2 crease. If the Commission had disagreed with the railroads'
3 submissions that they needed more revenue this Commission would
4 not have allowed the increase.

5 So that's an essential condition to the increase,
6 one that the Commission can separately consider finally to the
7 extent if at all there are any further administrative proceedings
8 possible as to that issue, they are only in the nature of re-
9 consideration and the availability of this reconsideration if
10 there is such availability is not a part of judicial review.

11 This brings me then to the other issues, the issues
12 with which, at least in large part, the New York plaintiffs
13 are concerned. Having concluded that the railroads' revenue
14 needs justified an increase to a certain average level the Com-
15 mission went on to consider the propriety of the allocation of
16 the additional revenues among the various shippers and various
17 commodities.

18 In particular, it had to consider or Sections 15(1)
19 and (7) contemplate that it would consider whether the rates
20 would have adverse effects on the movement of traffic, that is
21 diversion, principally and whether the rates were discrimina-
22 tory or preferential.

23 Here the question is not what the railroads need
24 but what individual shippers in shipping various things in
25 various places are willing to pay rather than decide not to ship

1 by rail and what they can fairly be required to pay, consider-
2 ing the relationships among the various rates and other matters.

3 As I say, the Commission has given some considera-
4 tion to the matters in the general revenue proceeding and it
5 did throw out a relevantly small number of the particular rates
6 because of defects that became apparent to the Commission in its
7 kind of preliminary once-over on the detailed rate-by-rate or
8 rate group-by-rate group issues. But it certainly did not in-
9 clude exhaustively that no rate might have such a defect and
10 therefore it expressly left open as it does in the general
11 rate proceedings, left it open for shippers to institute sub-
12 sequent proceedings by complaints under Section 13 or should
13 result in Section 15(1) proceedings, to attack particular rates
14 of interest to them.

15 Specifically with reference to this Court's decision
16 many years ago in the Arizona Grocery case, the Commission said
17 that we are not hereby prescribing all of the rates which are
18 in this kind of limited proceeding allowing the railroads to
19 increase generally.

20 So that we think that the complaint in the Atlantic
21 City case is, in large measure, an attack on this second aspect
22 of the general revenue proceeding which the Commission's kind
23 of once-over on particular rates. And these are matters which
24 while the Commission had considered them, it had not considered
25 them finally and could not on the record that the Commission had

1 before it and could have before it in a proceeding under this
2 kind of time pressures that there are in a general revenue
3 proceeding.

4 In short: these shippers have not exhausted their
5 administrative remedies and we think that judicial review should
6 not be available. As I indicated, there is a minor disagreement
7 in the framework of this case between the Commission and the
8 United States, the Secretary of Agriculture not being a party
9 in this case.

10 The United States believes that the Atlantic City
11 complaints can be read perhaps as raising an attack on the
12 general revenue needs findings and perhaps also as raising an
13 attack upon the general nature of the kind of proceeding that
14 the Commission has had. That, of course -- the Commission has
15 finally decided what kind of proceeding it's going to have and
16 I think that to the extent that shippers may want to raise the
17 question whether the Commission can have a general revenue
18 proceeding without finally determining all of the multitude of
19 rates involved, that, theoretically leads to the question that
20 is right for judicial review after the general revenue proceed-
21 ing is over.

22 But, the Commission and the United States do agree
23 that under all the circumstances as to the New York case it is
24 appropriate to remand that case so that the parties -- the
25 plaintiffs can amend their complaints if they wish and the

1 District Court can shape the litigation in accordance with its
2 general principles that we have suggested.

3 Let me say a further word about relief.

4 Q Does that put you in sympathy with Judge
5 Wright's dissent?

6 A Yes; completely in sympathy in the Alabama
7 Power case, which was the case he was focusing on.

8 Q He also referred to the other case, the
9 Atlantic case.

10 A Yes, he did. A problem with the Atlantic City
11 case is that that District Court in New York seems to have
12 read the complaint as having the generality that we believe the
13 Alabama Power complaint has and dismissing it on the same theory
14 that the majority of the district courts in the District of
15 Columbia dismissed the complaint there and I think they have
16 improperly read the complaint and also in terms of that judgment
17 -- in terms of that reading, made an improper judgment.

18 There is the problem to which Mr. Justice Stewart
19 has adverted, of multiple district court proceedings in matters
20 of this kind. Accordingly, we would suggest that in this case
21 the New York Court might well be instructed to stay its hand
22 until the District Court proceeding in the District of Columbia
23 is completed. That case was filed first; it involves, I think,
24 a larger number of shippers and it involves more clearly the
25 general issues which might, in practical terms, make the New

1 York case moot.

2 Q Why do you say it should be stayed?

3 A Just in the interest of orderly judicial
4 review. This would, frankly, be a judicial construct quite
5 analogous to what the Hobbs Act provides with respect to those
6 administrative agencies which --

7 Q You wouldn't be trying two issues in two
8 courts?

9 A At the same time when they are overlapping and
10 when one proceeding might well resolve all of the issues --

11 Q It could well mean many more than just two
12 courts; couldn't it? It could be in every district court in the
13 United States.

14 A Yes, it certainly could.

15 Q Very easily. I mean that's not a --

16 A Yes; but I think, as the Court pointed out in
17 the --

18 Q It's not a hypothesis at all because there are
19 obviously shippers in every Federal District; are there not?

20 A Yes, there certainly are, Mr. Justice, but as
21 the Court pointed out in Abbott Laboratories, there are remedies
22 for this kind of problem: transfers of venue under Section 1404(a)
23 stays; the possibility suggested by the complaintant in the
24 Alabama Power case of treating these cases as class actions.
25 So that we think that it is appropriate that efforts be made and

1 we think it's feasible to confine this kind of general review
2 that we would allow under the principles we suggest, in a single
3 three-judge court, leaving any additional matters that might
4 come up for subsequent litigation, perhaps, in another court.

5 Q Well, let's say a single three-judge court
6 supposedly was to prevent another shipper from thereafter bring-
7 ing a brand new proceeding in another three-judge court in some
8 other district? There is no statute of limitations, I under-
9 stand, and it would not be res adjudicata because --

10 A Yes, sir, as I think Mr. O'Malley suggested,
11 there is the aspect of laches --

12 Q Although --

13 A Well, the other protection is the judgment of
14 that three-judge court that it should --

15 Q I mean potential value --

16 A Yes, and of course and these are equitable
17 proceedings, of course and the Court is expected to exercise --

18 Q Are the increased rates now in effect?

19 A Yes, Mr. Justice and in fact, there have been
20 three subsequent increases which are in effect, in whole or in
21 part, since the 1968 proposal --

22 Q What is your suggestion that is to be done
23 about that; anything?

24 A About the additional increases?

25 Q The increased rates.

1 A Well, these rates are, of course --

2 Q Is there a way to take care of that one way
3 or the other, what you suggest?

4 A No, we have not suggested any effort to undo
5 those increases. I think there is the problem of interlocutory
6 relief about which the railroads talk. Of course, the standards
7 for such interlocutory judicial relief pending review are as-
8 stringent and probably in the ordinary case it would not be
9 appropriate to stay such an enormously broad-ranging group of
10 rate increases as are involved here.

11 Q Mr. Springer, you're familiar with the
12 existence of the Committee of Judicial Conference of the United
13 States on Multi-District litigation. I do not have it in mind,
14 frankly, but is the scope of the jurisdiction of that committee
15 broad enough to reach three-judge court cases as well as all
16 other type cases -- multi-district lit cases?

17 A I think so, Mr. Chief Justice, though as I am
18 not fully familiar with it. As I understand the particular
19 section in the Judicial Code relating to multi-district litiga-
20 tion I believe deals only with discovery; it doesn't go beyond
21 that to the matter of trial. But this certainly is a multi-
22 district problem very much like the problems that have given
23 rise to that committee and to the level of legislation that's
24 now on the books.

25 MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr.

1 Springer.

2 Mr. Cox.

3 ORAL ARGUMENT BY HUGH B. COX, ESQ.

4 ON BEHALF OF APPELLEES ABERDEEN & ROCKFISH
5 RAILROAD COMPANY, ET AL.

6 MR. COX: Mr. Chief Justice and may it please the
7 Court: I appear in this case for the railroads.

8 I think I should like to begin by commenting briefly
9 on some aspects of the statutory plans which were touched upon
10 this morning, but which I think perhaps I should like to ask
11 the Court to remember while I give my version of what happened
12 in this case and what the case is really about.

13 The point that I should like particularly to make
14 here is that when a carrier initiates a rate the only authority
15 that the Commission has to interfere with the timing of that
16 rate increase prior to a final determination that the particular
17 rates involved are unlawful, is the power to suspend the rates
18 for seven months. At the end of that time the rates become
19 effective by operation of law not by virtue of any order of the
20 Commission. That's what Section 15(7) provides. And they re-
21 main effective until the Commission has made a final determina-
22 tion that a particular rate involved in a rate change are un-
23 lawful.

24 This is the basic statutory plan that was involved
25 and discussed in the Arrow case and as the opinion there pointed

1 out, it was an accommodation between the interests of those who
2 thought that the railroads should not be able to change any
3 rate without prior approval of the Commission and the position
4 of the railroads who wanted to be able to change the rates with-
5 out any interference by the Commission, subsequent only to a
6 subsequent determination of their lawfulness.

7 And under this accommodation the railroads bear
8 irreparable the losses that are occasioned by a seven-month
9 suspension period. If the rates are thereafter held to be law-
10 ful the railroads have no way of recovering that money.

11 On the other hand, the shippers, if the rates go into
12 effect, at the end of the seven-months period are protected by
13 their rights to recover reparations or by the normal refund
14 provisions that the Commission can attach under 15(7).

15 Now, with that preface I should like to state what
16 I think happened in this case and what the real pragmatic con-
17 sequences, to take Mr. Springer's word of the Commission's orders
18 were: as has been said, the case started with a petition asking
19 for leave to file single master tariffs which the Commission
20 granted. Now, no review has been sought with that order.

21 And, after they got permission the railroads' filed
22 tariffs, which I think was to become effective on the 24th of
23 June in '68. They had to make it that far ahead because the
24 Commission, as a condition to giving them permission, required
25 them to do so.

1 The first thing the Commission did was to suspend
2 that first master tariff for that entire seven months' period
3 and at the same time, however, it said to the railroads: "Now,
4 if you want to file another tariff that makes only a three-
5 percent increase" -- the increase in the master tariffs being
6 from 3 to 6 -- to the railroads, "if you wish to file another
7 tariff that makes only a 3 percent increase we will not suspend
8 that tariff and the railroads did so and that 3 percent tariff
9 went into effect.

10 At the time the Commission did this it said to the
11 railroads, in effect in its order: "Now, we are investigating
12 this matter and we may decide later on that we should have sus-
13 pended these rates, even as to the 3 percent and if we decide
14 that we should have done that as to any or all of these rates,
15 then you are going to have to restore the situation to what it
16 would have been if we had suspended the rates, by making re-
17 funds."

18 The next thing that the Commission did was to issue
19 an order in November which has been called its "interim order,"
20 and in that order it decided, in effect, that it should not
21 have suspended any part of the rate increase and that it would
22 permit the entire rate increase to go into effect at the end of
23 November, at the same time again saying to the carriers -- and
24 the way they did that again was to say, You can file another
25 tariff which the railroads did which put the additional 3 percent

1 into effect.

2 At the same time it said to the railroad: "We're
3 still looking at this and when we come to our final conclusion
4 if we decide that we should have suspended some or all of these
5 rates for the entire statutory period, you are going to have to
6 restore the situation to what it would have been if there had
7 been such a suspension." And then at the end January it issued
8 a final order in which it said some of these rates -- a few of
9 -- I think there were about nine instances, should have
10 been suspended; otherwise we think that our orders can stand.

11 So, I submit to the Court that the issue in this
12 case, my view of what happened is simply whether an order of the
13 Commission which refuses to suspend a proposed rate increase
14 for the entire seven months' period, but does not determine the
15 lawfulness of all or any of the rates involved, but leaves that
16 to be determined in subsequent proceedings, is reviewable.

17 Because we believe that was the only consequence of
18 what this Commission did here. To put the matter another way:
19 we say that -- the actual pragmatic effect of these orders does
20 not differ significantly from an order that the Commission enters
21 in any ordinary suspension case in which it refuses to suspend
22 rates for all or any part or some part of its seven months'
23 suspension period.

24 Now, we believe that an order of that kind that we
25 think the order is, should not be reviewable and our reasons

1 rest both upon analysis of the statute and upon certain prac-
2 tical considerations.

3 The Commission has been issuing these general
4 revenue orders for more than 50 years and in allowing the cases
5 that we have cited and discussed in our brief at pages 24 and
6 25, the courts have held that these orders are not reviewable
7 and that the shipper has an adequate remedy by way of complaint
8 and reparation.

9 The courts have also held, which relates to what I
10 said a moment ago about the effect of this order and its rela-
11 tionship to a suspension proceedings, and they have held, I
12 think, uniformly, that an order of the Commission that refuses
13 to suspend rates is not reviewable.

14 Now, both of these lines of cases -- those cases, by
15 the way, are collected in the opinion in the Long Island case
16 in 193 Fed Sup. which is cited in our brief, at least the cases
17 up to 1961; since that time there have been a number of other
18 cases refusing to review orders that refused to suspend.

19 Now, both of these cases -- all of these groups of
20 cases: those that have refused to review the general revenue
21 orders and those that have refused to review the orders declin-
22 ing to suspend, if you examine the opinions, seem to me to rest
23 on two related considerations.

24 One rests on the structure of the act and particularly
25 on Section 15(7) because it seems clear and this was the purpose

1 of my preliminary statement that under that section the
2 question of whether the Commission should interfere with the
3 timing of the proposed rate increase by suspending the rates is
4 not a matter that is appropriate for judicial review because it
5 is committed to the Commission's discretion.

6 The Commission, when it refuses to suspend a rate, is
7 not required to make any kind -- not required by the statute to
8 have any hearing; it's not required to give anybody any reasons
9 for its actions. The statute permits it to do that. And long
10 ago in the Board against the Great Northern case which I think
11 is in 281 U.S. This Court said that the power of suspension
12 is entrusted to the Commission only.

13 Now, we submit when you look at this -- I'm going to
14 come to the practical considerations in a moment -- but we will
15 look at this body authority and consider it as it existed at the
16 length of time it had, we submit that there is no reason to
17 depart from it in the case of these general revenue determina-
18 tions. They do not, and I will discuss this point in a moment,
19 also -- they do not determine the lawfulness of any or all of
20 these rates that the railroads may increase as a result of the
21 order. Now, as I think, they do not preclude the shipper from
22 litigating any issues that are relevant in any Section 13 pro-
23 ceeding.

24 These orders, and I want to say a word about this --
25 now, I think it is clear that they do not determine the lawfulness

1 of any of the rates and I'm not sure that the Appellants
2 dispute that fact, but there isn't any room to dispute it be-
3 cause the Commission says right in its report that it is not
4 determining that any of these rates are reasonable rates; that
5 every one of them is subject to correction and that they are
6 in all respects, and I emphasize "in all respects," and this is
7 the Commission's language, they are in all respects, subject to
8 complaint and investigation.

9 And again, long ago this Court in the Brimstone
10 case in talking about orders of the very kind that are here in-
11 volved, said, "Those orders do not approve or fix any rates;
12 they do not determine that any rate is reasonable; they do not
13 approve in advance any rate that may be filed as a result of
14 the order."

15 Q Mr. Cox.

16 A Yes.

17 Q I think, if I understood you, you told us that
18 this body of authority, with respect to the nonreviewability
19 of a refusal to suspend here was based upon two foundations:
20 first 15(7) and 15 -- what is the other?

21 A Yes -- the other idea is that the shipper has
22 an adequate remedy under the complaint proceeding to which he
23 should resort before seeking judicial review. You will find
24 those two notions implicit in all --

25 Q And it's a -- over on the nonfinality, I

1 Suppose or something?

2 A Yes. I have difficulty, I must confess to the
3 Court, with the concept of finality. It's always a question of
4 what an order is final about. Now, I would be prepared to
5 concede that this order is final so far as it refuses to suspend
6 rates, but it isn't final as to lawfulness.

7 Q Prematurely.

8 A Yes; prematurely.

9 Q Lack of maturity.

10 A That's right. But it's a combination of those
11 things that you will find in those opinions and you will find
12 them both in the opinions that relate to simple refusals to
13 suspend and anything that has to do with the general revenue
14 orders.

15 Q I notice that the general revenue orders go
16 back 50 years, you say?

17 A Yes, ah -- there seems to be an appearance of
18 ennui when I answer this question because I have recently read
19 all of them -- the first general revenue proceeding was really,
20 I think, in 1910 or 1911, just after the Mann-Elkins Act was
21 passed, but I would say that the form of proceeding that we have
22 before us today really began after the Transportation Act of
23 1920 and with the general rate increase of 1920.

24 The decisions of the general rate proceedings before
25 the Kaiser war are, I think, in somewhat a different category.

1 But after 1920 this thing developed until it -- and by early in
2 the thirties it had reached about the kind of form and substance
3 that it now has.

4 Q It's really a procedure not explicitly contem-
5 plated by the legislation; is it?

6 A That's right; this is an administrative
7 mechanism which the Commission --

8 Q Based upon necessity.

9 A Yes. You might say, to paraphrase Sir Henry
10 Main, that "It has been secreted in the interstices of the pro-
11 cedure that is provided by Section 15(7)," but it's a little --
12 it's quite different kind of a development that rests on that
13 but is, in certain respects, different.

14 I may say, since you have raised this question that
15 the Commission itself has, in its orders; it didn't in these
16 orders, but in the other general revenue orders it is recognized
17 that what I said about the similarity between this and the sus-
18 pension case. In the 1920 general rate increase Commissioner
19 Eastman in his concurring opinion, said, "Essentially what we
20 have here is a proceeding like a suspension proceeding. There
21 is no finality about it; we are just deciding whether we should
22 allow these rates to go into effect."

23 And in two later rate decisions, although I cannot
24 be certain about these, but I think it was the general rate in-
25 crease of 1958 and the general rate in 1960 that the Commission

1 made somewhat comparable statements comparing this with what
2 goes on in an ordinary suspension case.

3 I think in one of the opinions they quoted Mr.
4 Eastman's statement in one of the 1920 cases.

5 Now, from what I understand to be the Appellants'
6 position, they do not deny that they have another remedy, but
7 they argue that the remedy is not adequate and so far as I can
8 understand I think that argument rests essentially on the inten-
9 tion that because of the Commission's determinations in a
10 general revenue proceeding; they would be precluded either by
11 something like the doctrine of res adjudicata or as a practical
12 matter, from relitigating these issues or relevant issues in a
13 complaint proceeding.

14 Now, we submit that they are simply wrong about that
15 and that there is no want in authority or logic or in Commis-
16 sion precedent of practice for the view they take. I think I
17 should say this in candor about these general revenue determina-
18 tions that are made in the general revenue order. They relate,
19 of course, to all rates and to all carriers as a group and are
20 made on the basis of physical evidence but in a very general
21 way.

22 Now, the determinations tthat the Commission makes
23 on that kind of evidence in that kind of proceeding may have
24 only a limited relevance in a proceedings relating to a parti-
25 cular rate but, while the Commission in those proceedings, does

1 often give consideration to the revenue needs of the carriers;
2 sometimes in general terms; sometimes simply in terms of the
3 revenue needs as related to a particular traffic involved.

4 But of course, these revenue needs in a particular
5 rate proceeding are only one of several factors. The Commission
6 has often told the railroads that they can't justify a rate
7 particularly just because they need money; they have to justify
8 that there is reasonableness on other grounds and that they can
9 look at comparisons to comparable rates with the nature of the
10 commodity; with the costs involved to what degree there is com-
11 petition; by other modes of transportation; the suggestion that
12 they in these particular rates cases, that the Commission
13 doesn't examine the problem of diversion, is, I think, mistaken.
14 They look at all these things.

15 Now, the extent that the -- any issue that is deter-
16 mined on whether revenue needs or anything else, is relevant in
17 a particular rate proceeding, complaint proceeding, we submit
18 that the Commission will look at it; the shipper is not precluded
19 from raising it and litigating it and getting -- entitled to
20 have judicial review of any determination the Commission makes
21 about it.

22 Now, they have cited -- there has been some discus-
23 sion of the Koppers case in 303 ICC. I think Mr. Springer was
24 quite candid in indicating and I join with him, that no one
25 quite knows what that murky passage in the opinion means. I

1 think I know what it means, but I can't be sure about it -- I
2 think all it meant was that the Commission wasn't going to
3 litigate in that case, whether it made a mistake in refusing to
4 suspend the rates.

5 Q You're talking about the Koppers case?

6 A The Koppers case; yes. I think that's what it
7 means. There are other cases we have cited in our brief. One
8 is the Globe Soap case where the railroads tried to justify a
9 rate on the grounds that it had been issued pursuant to an
10 general revenue order and the Commission said, "No; you can't
11 do that; that's no justification whatever for this rate. We
12 didn't approve this rate and we didn't fix this rate. You've
13 got to justify it."

14 Now, I think what is more significant is that the
15 Commission has awarded reparation, found rates to be unjust and
16 unreasonable and awarded reparation with respect to rates that
17 were established pursuant to these general revenue orders, and
18 when the railroads have tried to argue that those orders were
19 justification for the rates the Commission said, "No; they are
20 not a justification" and at least in one instance the courts
21 said that that was quite correct. That's the Cotton Florida Oil
22 Company case, I think, which is against the Southern Railway, I
23 think it was in 51 Fed. Supp.

24 So, as a practical matter, and I accept the pragmatic
25 test as a practical matter in these complaint proceedings, even

1 though the rate is at the level fixed by or level that the
2 railroad fixed pursuant to some general revenue order, the
3 Commission has looked at the rates, held that they are unjust
4 and unreasonable and given the shippers reparation.

5 Now, I must confess that I am not sure that I al-
6 together understand the argument which the Appellant makes on
7 this point of the adequacy of remedy. They have referred to the
8 fact that the Commission did say and we know that taking its
9 report when it decided not to suspend these rates for the full
10 period that it found that the general level of rates was unjust
11 and reasonable, a statement which immediately qualified by
12 saying, "We are only talking about the general basis for the
13 rates; we are not holding that any of the rates are lawful and
14 they are all subject to investigation and complaint in all
15 respects."

16 But then the Appellants say that in a complaint pro-
17 ceeding they can't attack the general level of these rates, and
18 at that point, either because of some weakness of the flesh or
19 infirmity of the mind I cannot follow them because I assume,
20 perhaps in blindness, that what a shipper pays is the rate that
21 is applicable to his shipments and his commodities; he doesn't
22 pay any general rate level and under the statute if he has a
23 remedy that will give him the just and reasonable rate which he
24 has in this case, that that satisfies the statute. If he gets
25 judicial in that proceeding, that that is an adequate remedy.

1 Now, I think if you look, and you can only do it, I
2 think, by random sampling, you will see that when the Commission
3 determines the justness and reasonableness of a particular rate
4 this abstraction of the general rate level has not had any
5 weight in the deliberations. It considers in view of those
6 cases on the basis of the facts precluding the revenue needs
7 that the evidence before it relates to those rates and to the
8 extent, as far as I can tell from reading the reports of the
9 Commission, is that it relies on precedent; it relies only on
10 cases in which it has actually prescribed or determined that a
11 rate is lawful.

12 Q Suppose they said that in this case here they
13 could get these rates set aside and then turn right around and
14 lose the case in which the railroads filed specific rates on
15 their commodities?

16 A That's right; same rate and possibly a higher
17 rate.

18 Now, I said a moment ago that in discussing review-
19 ability I was going to come to the practical considerations that
20 we think support our analytical argument, based on the statutes.

21 The first of those statute considerations has to do
22 with this matter of injunctive relief. Now, I have to say that
23 in discussing these problems I find them very puzzling and I
24 fear I am going to be more adept at raising them than I am at
25 answering them. The trouble is that because the general revenue

1 orders have never been reviewed and the orders refusing to
2 suspend rates have never been reviewed, there simply isn't any
3 precedent and this is a very uncharted line of country.

4 Q Mr. Cox, doesn't it really sound as though the
5 just and reasonableness language is just inappropriate for the --

6 A It's inappropriate --

7 Q -- and this is -- they are really saying there
8 is probably cause to increase the rates; there is enough
9 evidence to not suspend --

10 A That's right; or you could say they say, "We've
11 had a look at them and it doesn't appear to us there is any
12 reason why we should suspend them for the -- statutory period;
13 we will allow them to go into effect and we will determine
14 whether --

15 Q The Commission hasn't said anything?

16 A The odd thing is, Mr. Justice, that in an
17 ordinary suspension case they do say that --

18 Q They don't say --

19 A They do say that they use this same kind of
20 justness and reasonableness language.

21 Q In specific rate cases?

22 A In specific rate cases, although if there is
23 anything that's well settled it is that when they suspend or
24 refuse to suspend rates they are not making any determination
25 about its lawfulness.

1 If you would like to look at a case where they used
2 that kind of language, in a specific rate case, I think --

3 Q Well, it bar anything in a subsequent decision.

4 A No; no. This bureaucratic language tends to
5 repeat itself and shift from place to place sometimes without
6 too consideration of whether it's appropriate, but they use this
7 "just and reasonable" language even in an ordinary suspension.

8 Q Can they do --

9 A Well, they can do that; they don't have to say
10 anything and they can do that. As a matter of fact, in one of
11 the successful rate increases that followed this one, the one
12 in 1969, they let that go into effect at once. They refused to
13 investigate anything except questions of discrimination and pre-
14 ference; they wouldn't investigate reasonableness and they did
15 this in an order that's about a page and a half. They didn't
16 go through this elaborate discussion and make these findings and
17 have all these reasons. And under the statute they can do that.

18 They have developed the practice over the years of
19 writing these elaborate dissertations in these general revenue
20 cases and this -- and why they used the language in the suspen-
21 sion cases, I could not attempt to explain.

22 But, if I may go back to the problem of injunctive
23 relief, I think the Appellants have not quite met the real
24 problem there which is a problem, I think, that suggests that
25 the kind of relief that they really want on judicial review,

1 can't be obtained without doing violence to the statutory plan.

2 Now, what I mean by that is this: these general rate
3 proceedings frequently consume a large part of the statutory
4 seven months' suspension period and people can't -- don't go
5 into court until the Commission suspension. Now, when somebody
6 goes into court and wants interlocutory relief, and it is
7 natural for them to do so because that's one of the purposes of
8 judicial review. The court is going to be faced with the
9 problem of whether they can enjoin the rate increase beyond the
10 seven months' period because in some cases by the time they get
11 to court seven months period will have expired or nearly expire.

12 And the same question will arise as to -- and it was
13 raised this morning, I think there, or after lunch, as to what
14 the Court does after a final hearing, if it finds that there was
15 some infirmity in this order. Does it enjoin the rates for
16 more than a seven months' period? Now, the position

17 Now, the position of the railroads is: neither the
18 Commission, nor court, even as an incident to judicial review,
19 can enjoin or suspend its rates that have not been adjudicated to
20 be unlawful as such, beyond the seven months' period. But the
21 law on that point is not yet clear and what the railroads, with
22 reason, apprehend, is that first: they can't be certain how the
23 question will be settled, and second: until the question is
24 settled and settled in a way it applies to all the possible
25 situations, that these general rate increases are going to be

1 indefinitely delayed in many cases, beyond the seven months'
2 period by interlocutory and final injunctions and it has been
3 observed that these suits can be brought in any District in the
4 country. They can involve different commodities, different
5 shippers, different arguments to be made about the general
6 rate increase.

7 The Government recognizes this problem and it has
8 attempted to make some palliative suggestions which we have
9 discussed in our brief, but I think when you look at those
10 suggestions and consider all of them you can see that they are
11 not likely to really solve this problem. And of course, if the
12 problem is they cannot get relief beyond the seven months'
13 period, which is our position, then one of the principal pur-
14 poses of judicial review, I suppose, is gone at this point.

15 The judicial review of these orders would also
16 create some difficult problems about the refund provisions of
17 the Commissions general revenue orders. Now, we have discussed
18 that matter in our brief and I would like to refer the court to
19 that discussion and I would simply like to say this about it:
20 that that is a difficulty that arises because these refund
21 provisions in these general revenue orders are a little peculiar.
22 Unlike the normal refund provisions in an ordinary section 15(7)
23 case they do not come into operation -- their operation does not
24 depend, I should say, upon the final determination that particu-
25 lar rates are unlawful. Their operation simply depends

1 upon a determination by the Commission that it made a mistake
2 in allowing the rates in becoming effective and not to suspend
3 the rates.

4 So that under these provisions the railroads could
5 and do, at times, have to refund the money that they collected
6 from rates that had never been determined to be unlawful and
7 which may thereafter be determined to be unlawful simply be-
8 cause the Commission has determined that the rates should have
9 been suspended.

10 Now --

11 Q May I stop you a minute?

12 A Yes.

13 Q The refund comes by order of the Commission; is
14 that by rule or how does that come about?

15 A Mr. Justice, I think that these refunds I'm
16 speaking of are refunds that the Commission attaches as condi-
17 tions to its refusal to suspend the rates.

18 Q Thank you.

19 A And when the railroads take advantage of that
20 refusal, of course they have to accept the conditions and they
21 are bound by them.

22 Now, if these refunds -- heretofore there has been
23 some uncertainty about these refunds but the railroads have at
24 least been certain that the time in which the liability would
25 accumulate would be limited to the time that the Commission

1 was required to consider the matter and while there was un-
2 certainty it was an uncertainty that arose from the uncertainty
3 about what one agency would do. Now, if there is to be judicial
4 review of these orders, of course, the time within which this
5 uncertainty would continue and the length of time in which
6 this contingent liability would accumulate, would be extended.
7 And the uncertainties will be increased by the fact that there
8 you have two agencies instead of one whose views on these
9 matters may differ.

10 Now, that means that the railroads get a general
11 rate increase if there is to be judicial review or they have a
12 very grave problem about whether they can use this money or
13 howmuch of it they can use or whether they have to set out the
14 contingent reserve to take care of this contingent liability.
15 They can't very well plan or make definitive plans or use the
16 money for permanent purposes. In the present cash position of
17 many of the railroads this is rather a serious problem.

18 I have so far in this argument, talked about the
19 Commission's order simply in terms of what its consequences are
20 on the general level of rates or on rates generally. I would
21 now like to say something about what I think is a minor point,
22 really, about the provisions of the orders that grant relief
23 under the Fourth Section and from outstanding orders.

24 Those provisions of the order affect only a very
25 small number of the rates and they do not have much economic

1 significance. I am told that the rate experts in the rate
2 conferences say that even without that relief they could gen-
3 erally achieve the economic results of a -- of one of these
4 general revenue orders by excluding those rates and making them
5 the subject of separate proceedings.

6 But, for purposes of this afternoon I am going to
7 assume that orders that grant Fourth Section relief and relief
8 from outstanding orders, are in an appropriate case, reviewable.
9 But, my submission is that in this case it is not an appropriate
10 case to review the provisions of those provisions of the orders
11 that are here before the Court.

12 The Appellants here have not alleged that any of the
13 named appellants are affected in any degree by those provisions.
14 They have not argued that they are affected and when you look
15 at their arguments they aren't directed to Fourth Section
16 problems or to any problems that arise under outstanding rate
17 orders; they are directed to the general revenue determinations
18 of the Commission and the way it made them.

19 Now, precisely a similar situation, in the Algoma
20 case in 11 Fd. Supp. was the same kind of argument made and the
21 Court said, "Well, these shippers haven't shown they are affec-
22 ted; these provisions are simply incidental to the main purpose
23 of the order and we won't review them. And we submit that that
24 should be the conclusion here.

25 I am not going to say anything about the assertion

1 that some of these appellants represent all shippers of all
2 commodities in the United States, except to say that lest some
3 of these vague indications of who this enormous class may be
4 that are affected by the Fourth Section orders, I shouldn't
5 think that justifies judicial review.

6 And finally, if the Court should think that it has to
7 look at that part of these orders then I suggest that the
8 review should extend only to those rates that are covered by the
9 Fourth Section provisions and the relief from outstanding
10 orders and not extend to the generality of rates of the general
11 revenue determinations that are here involved.

12 I think that I should like to conclude by saying
13 something about the merits of this case. We have asked this
14 Court if it, in the unhappy event that it should determine that
15 these orders were reviewable, to consider the merits of the
16 orders and affirm them.

17 Now, we knew when we made that request that this
18 Court has often said that it will not or it is reluctant to
19 consider agency orders or findings that have not been reviewed
20 by the lower court, but that, I assume, is not an ironclad rule
21 and this Court has sometimes departed from it and I am obliged
22 to say that there are very urgent and powerful considerations
23 in the present situation that would suggest that it would be
24 appropriate for this Court to determine the validity of this
25 order.

1 For one thing, this contingent liability under the
2 refund provisions is accumulative, it accumulates possibly at
3 the rate of \$400 million a year and if the railroads are going
4 to have to give some or all of that back, it seems to me the
5 sooner they know about it the better.

6 But, apart from that it has been stated there have
7 been three rate increases since this rate increase that is here
8 involved and the showing that the railroads made to the Commis-
9 sion on those rate increases, they of course are assuming the
10 validity of this rate increase in income produced and presumably
11 in granting relief that the Commission itself assumed the same
12 thing.

13 Now, again if this rate increase is to be invalidated
14 in some way the railroads are going to have to give back any or
15 all of the large amount of money involved, the sooner the rail-
16 roads, and I suppose, the Commission, know that, the better so
17 that they can decide whether they have to take any steps in view
18 of that situation with respect to the revenue situation of the
19 railroads.

20 Now, as far as the merits are concerned, we argue in
21 our brief and its reply that the Appellants in the Alabama
22 Power made an argument on the merits; the Appellants in the
23 Atlantic City case have refused to argue in their briefs in this
24 Court, although we tendered the issue to them, but they insisted
25 that they be included in the appendix, a memorandum that they

1 submitted to the District Court below and that memorandum
2 contains their argument on the merits so held before the court.

3 Now, we have discussed this matter of the merits of
4 the Commission's order in detail in our briefs and I should
5 merely like to say this: that I think when you look at the
6 Appellants' argument and consider the nature of the proceedings
7 that's here involved, which is the proceeding, as I have said,
8 that was really essentially devoted to the question of whether
9 these rates should be suspended for the whole seven months'
10 period.

11 But, those arguments do not provide any basis for
12 overturning the Commission's judgment. Apart from certain
13 procedural arguments which really relate to how the Commission
14 manages its internal business, they are simply arguments that
15 attack the Commission's judgment on the evidence, on the weight
16 it gave to conflicting evidence; on the inferences and con-
17 clusions it drew from the evidence and on the wisdom of its
18 final determination not to suspend these rates for the entire
19 seven months' period.

20 Now, these arguments set forth in the reply of the
21 Alabama Power Appellants indicate that: they say that the
22 Commission shouldn't have authorized it nationwide; it shouldn't
23 have used 1966 as a test year for the increase in expenses; and
24 other arguments of that kind; all matters about which reasonable
25 men may differ but they are also matters as to which the

1 Commission has an area of judgment, and which its judgment, I
2 suppose, will be respected unless it's shown to be arbitrary
3 and capricious and I think that when you read the Commission's
4 report in this case, the interim report, and the final report,
5 it is apparent that the Commission considered all the evidence
6 and gave a reasoned statement for its conclusions.

7 And I think it is not impermissible for me to say at
8 this point that anyone who reads the facts that are set forth
9 in the Commission's reports in the three succeeding general in-
10 crease cases that have come along since these orders were in-
11 volved, anyone who looks at those reports and reads the facts
12 they will contain -- that they contain, I think would be led to
13 the conclusion that when the Commission decided in 1968 that the
14 railroads were in immediate and drastic need of increased rate
15 -- that experience has shown that the Commission was not acting
16 arbitrarily and unreasonably when, on the basis of that con-
17 clusion it declined to defer or suspend this rate increase.

18 Q Mr. Cox, can you say offhand how many general
19 revenue orders have there been since 1920 or whatever the
20 beginning date was?

21 A There have been, I think, around 15, Mr.
22 Justice. Of course, some of those orders have involved more than
23 one report -- and reported in more than one place because some
24 of them went on for a time. I once had them all in the book
25 rack and it was a depressing sight to see that there were that

1 many of themmany of them, but I think there have been about
2 12 or 15.

3 Q Do they always involve all the railroads or
4 sometimes just a group of railroads?

5 A Well, my recollection --

6 Q Or just in certain regions --

7 A In the cases since 1920, Mr. Justice, my
8 present recollection is and it may be a little blurred, but I
9 think that they usually involve all the railroads. Now, before
10 1920 my recollection is that there were some cases that involved
11 only the eastern railroads, and in some cases it involved only
12 the western railroads, but I feel fairly confident that in the
13 last 20 years it has involved all railroads. Now, sometimes the
14 railroads ask for different amounts of increases and they may
15 file different applications, but when the Commission gets to
16 consider them it usually treats them with one big proceeding.

17 Q When you said in response, "the last 20 years,"
18 did you misspeak yourself or did you mean --

19 A Well, I -- what I meant was precisely that,
20 Mr. Chief Justice, I have a somewhat clearer recollection of the
21 cases since about 1950 than I have of the cases before that, and
22 ~~there~~ may have been some cases that before that that perhaps
23 not allthe railroads were involved, but I think since 1920
24 most of them I remember, they were all the railroads in the
25 United States.

1 Q Where is the Aberdeen and Rockfish Railroad?

2 (Laughter)

3 A I thought I had prepared thoroughly but I --

4 (Laughter)

5 Q It's not one of the large carriers, is it?

6 A It's not one of the large carriers.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cox.

8 Mr. McCarthy.

9 REBUTTAL ARGUMENT BY CHARLES J. MC CARTHY, ESQ.

10 ON BEHALF OF THE APPELLANT ALABAMA POWER

11 COMPANY, ET AL.

12 MR. MC CARTHY: If the Court please: this effort to
13 equate suspension with the order in this case is pretty far-
14 fetched. Suspension is something -- an order not to suspend
15 is an order which the Commission makes without any record, on
16 the basis of a casual observation of the contentions of the
17 parties.

18 Here we have an order made after extensive hearings
19 and on the basis of detailed findings. That's the distinction
20 between a suspension order and this type of order. The sus-
21 pension order is discretionary and that's the reason it's not
22 reviewable.

23 Now, the mere fact that an order doesn't finally fix
24 the lawfulness of rates does not stop it from being reviewable.
25 In both interstate, in the Mechling case and the Waterways case,

1 the orders there involved did not finally fix the lawfulness of
2 rates. The court commented that the rates were still subject
3 to reparation that there was no question about them being re-
4 viewable.

5 Finally, I don't think I have been able to make my-
6 self clear as to the relationship between a general level of
7 rates and a particular rate. When the Commission fixes this
8 general level and I go back in for a complaint against a par-
9 ticular rate that general level is a standard against which my
10 rate is measured. I don't get a chance to litigate that question
11 again. And if I am raising no questions, as I am, about how a
12 particular rate should be related to that general level I have
13 nothing to go back to the Commission with. It's a waste of my
14 time, a waste of the Commission's time.

15 Q You lose the case if you are wrong?

16 A No, Your Honor.

17 (Laughter)

18 Because we have here an order set out modifying out-
19 standing orders. We have a class action on behalf of all
20 shippers; the railroads concede that there are such outstanding
21 laws; it concedes that Fourth Section relief is necessary --

22 Q So it isn't really critical to your --

23 A Well, except for that point there. I think we
24 can win either on the basis that we have no administrative
25 remedy and we don't have, but only can win on the basis that

1 there is an order modifying our standing orders and granting
2 Fourth Section relief which cannot be done without a hearing.

3 Thank you.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. McCarthy.

5 The case is submitted, gentlemen.

6 (Whereupon, at 2:20 o'clock p.m. the argument in the
7 above-entitled matter was concluded)

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